<u>Summary of Restore Aging Infrastructure Now (RAIN) Act</u>
Senators Feinstein and Padilla -- June 2023

This bill has one operative provision, section 2.

<u>Section 2, Extraordinary Operation and Maintenance Work; Project Modification</u>

- This section amends the existing Aging Infrastructure Program (Public Law 111-11, Title IX, Subtitle G) to authorize projects to not only repair aging Bureau of Reclamation transferred works facilities, but to modify the facilities to achieve increased public benefits and other project benefits.

- Congress appropriated $3.2 billion for the Aging Infrastructure Program in the Infrastructure Investment and Jobs Act.

- If we are spending this much money to retool Reclamation infrastructure for the needs of the 21st century, the Secretary should have the authority to modify the projects to achieve increased public benefits and other project benefits, where she believes it is appropriate to do so.

- This provision is limited to transferred works facilities, those facilities which are owned by Reclamation but operated and maintained by a non-federal entity. This provision does not apply to reserved works facilities that Reclamation both owns and operates.

- In California, this could be particularly helpful for projects to restore major Central Valley Project canals that have lost up to 60% of their conveyance capacity due to subsidence. These projects are important to allow farmers to capture runoff from our increasingly concentrated winter storms and move the water to overdrafted areas where they can recharge the local aquifers.

- If the Secretary has the authority to work with project beneficiaries to modify these major canal projects, she can add increased turnouts to provide drinking water for the many disadvantaged communities along the canals, and to provide additional water for wildlife refuges.

- Subsection (a) adds a few key terms to the existing definitions for the aging infrastructure subtitle in section 9601 of Public Law 111-11 (43 USC 510). These include "public benefit" in paragraph (8), which is defined as either (i) a public benefit identified under the reclamation laws, or (ii) a drinking water benefit for one or more disadvantaged communities.

- Subsection (b) addresses the role of nonreimbursable costs in section 9603(b) of the aging infrastructure subtitle (43 USC 510b(b)).

  - Amendments to paragraph (2) establish that the Secretary may advance "from the Aging Infrastructure Account established in subsection (d)(1) or any other applicable available account the costs, including reimbursable and non-reimbursable costs" of the extraordinary operation and maintenance work for transferred works.

- Significantly, a new paragraph (4) inserted into 43 USC 510b(b) makes clear that drinking water benefits for disadvantaged communities as defined in 43 USC 510(8)(B) shall be considered to be nonreimbursable costs. This is an important change, because under traditional reclamation law Interior would seek reimbursement from all municipalities including disadvantaged communities for the provision of drinking water supplies.

- Eligible disadvantaged communities are defined in 43 USC 510(2) using existing precedent that their median family income must not exceed 80% of the statewide median family income.

- Subsection (c) includes conforming amendments to the Aging Infrastructure Account established in subsection (d)(1) (43 USC 510b(b)). These conforming amendments make clear, consistent with the changes to subsection (b) discussed immediately above, that funds in the account can be used for reimbursable or nonreimbursable purposes.

- Subsection (d) establishes a new subsection 9603(e) in the aging infrastructure subtitle (43 USC 510b(e)) entitled "Authorization to Modify Transferred Works to Increase Public Benefits and Other Project Benefits As Part of Extraordinary Operation and Maintenance Work."

- Paragraph (1) of the new subsection (e) establishes a few basic principles for any modification of transferred works as part of extraordinary operation and maintenance project work:

  - It shall add no more than 25% of the original cost of the planned extraordinary operation and maintenance work if such work would cost over $100 million, or no more than $25 million if the original cost of the planned extraordinary operation and maintenance work would cost under $100 million per subparagraph (B) (projects exceeding these thresholds would need to be authorized by Congress);

  - At least 50% of the new benefits provided by the modification of the project must be public benefits pursuant to subparagraph (C) (note that "new benefits" is a term defined in paragraph (1)); and

  - In order to undertake a project modification, pursuant to subparagraph (D) the Secretary shall obtain the consent of:

    - The transferred works operating entity; and

    - Any project beneficiary that would experience an adverse impact from the operation of the modified project (note that "adverse impact" is a term defined in paragraph (1)).

    - If the modified project creates a new project beneficiary, the Secretary cannot subsequently reoperate the project to increase the benefits to that new beneficiary without the consent of any project beneficiaries that would experience an adverse impact. Subparagraph (E).

    - The costs of planning, design and environmental compliance of the modified project shall be allocated in accordance with Reclamation procedures, with the caveat that any project beneficiary who does not receive any increase in long-term average annual water deliveries as a result of the modification shall not be allocated any reimbursable portion of these costs. Subparagraph (F).

    - A project modification that is otherwise eligible under this section shall remain eligible, even if it is in planning, design, or construction on December 31, 2022. Subparagraph (G).

- Paragraph (2) sets up a process for the Secretary to obtain consent for a modified project from project beneficiaries that would experience an adverse impact. If the necessary consent is not obtained within twelve months of the date consent is requested, the extraordinary maintenance of the project shall proceed without the modification, subject to one twelve-month extension to obtain required consents at the Secretary's discretion.

- Paragraph (3) addresses the reallocation of costs based on project changes and increased public benefits. Annual operation and maintenance costs associated with nonreimbursable purposes of the project shall be non-reimbursable, and the cost allocation of reimbursable costs to each project beneficiary shall reflect the changes in benefits that the project is providing to that beneficiary.

- Paragraph (4) addresses incentives to participate in modifications to planned extraordinary operations and maintenance work where public benefits are increased, but not water contractor benefits.

    - The water contractors will face strong disincentives to participate in these projects. Some contractors may see their benefits reduced. All contractors will have to accept significant delay in obtaining the benefits of the restoration of these projects. It will take significant time to modify the projects in a manner that the contractors can accept, and then to conduct environmental compliance on the proposed modification. The contractors will also have to accept modified project operations that give increased priority to public benefits.

    - To offset these disincentives for water contractors to participate in projects which increase just nonreimbursable public benefits, the bill reduces the reimbursable costs for such modified projects by 15%. The result is that each project beneficiary will pay 85% of the reimbursable costs for the original planned extraordinary operations and maintenance project that the beneficiary would otherwise have been allocated.

- This paragraph sets up a financial incentive for water contractors to support modified projects that solely increase environmental and other nonreimbursable public benefits (including drinking water for disadvantaged communities) without increasing reimbursable water supply benefits. Without this financial incentive, water contractors might be expected to frequently oppose such modification of the projects that they rely on for water deliveries. In the case of canal restoration projects, the agricultural water districts will receive less water than they would have under the original canals at full capacity if an increased amount of the water is diverted for disadvantaged communities or wildlife refuges. The financial incentive is important in this context to avoid generating agricultural water district opposition to project modifications to benefit disadvantaged communities, wildlife refuges, and other environmental benefits.

- This paragraph is also consistent with the provision of some non-reimbursable benefits for water supply in the context of other authorizations for projects that provide both water supply and substantial public benefits in a watershed:

  - Title XVI provides 25% non-reimbursable benefits for projects providing water supply that have watershed benefits through the use of recycled water; and

  - The large-scale water recycling program that Congress just authorized in the Infrastructure Investment and Jobs Act provides up to 75% non-reimbursable benefits for projects that likewise provide both water supply and watershed benefits through the use of recycled water.

- Given the inevitability of increasingly severe and lengthy droughts as the West's climate changes, it will be essential to provide incentives to collaborate on multi-benefit projects that bring agricultural, environmental, and urban interests together to address the very serious challenge of maintaining sufficiently reliable water supply for all, including disadvantaged communities. This proposed amendment to the Aging Infrastructure Program seeks to increase incentives for such necessary collaboration.